MATRIX MOMENTUM SDN BHD

v.

SARATOGA SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
AZHAR MA'AH J
[CIVIL SUIT NO: 22-20-2001]
10 JANUARY 2002

CIVIL PROCEDURE: *Summary judgment - Proper procedure - Mode of application - Facts deposed in affidavit in Form 18 - Whether derived from plaintiff's solicitors - Whether facts ought to be within deponent's personal knowledge - Whether O. 14 r. 2(1) of Rules of the High Court 1980 complied with - Whether deposition could be admitted as evidence*

CONTRACT: *Sale and purchase of property - Late delivery of vacant possession - Sale and purchase agreement - Provision for liquidated damages for late delivery of vacant possession - Whether plaintiff allowed to sue for damages only - Whether time an essence of agreement - Whether plaintiff entitled to rescind contract - Contracts Act 1950, s. 56*

LAND LAW: *Housing developers - Sale and purchase agreement - Late delivery of vacant possession - Provision for liquidated damages for late delivery of vacant possession - Whether plaintiff entitled to rescind contract - Whether time an essence of agreement - Contracts Act 1950, s. 56*

The plaintiff agreed to purchase a condominium by entering into a sale and purchase agreement with the defendant. The defendant failed to deliver vacant possession of the said property within the stipulated date in the agreement. Instead of suing for damages, the plaintiff sought to terminate the contract and demanded the moneys paid thus far towards the purchase price together with damages. When the defendant did not reply to its demand, the plaintiff applied for summary judgment under O. 14 of the Rules of the High Court 1980 ("the RHC") and this was granted by the senior assistant registrar.

This was an appeal against the said order by the defendant, contending that the plaintiff was only entitled to damages as per the agreement but not to annul the contract. The defendant also raised a preliminary objection on the ground that there was non-compliance with Form 18 in relation to the plaintiff's application under O. 14.

Held:

[1] Order 14 r. 2(1) of the RHC prescribes the mode in which an O. 14 application ought to be made. It provides that in the affidavit for such an application, a verification of facts is required by the deponent on which the applicant's claim and application is based and by reason of that the deponent believes that the defendant had no defence. (p 165 c-e)

[2] Rule 2 does not require the source of the deponent's knowledge to be his own. A perusal of the plaintiff's affidavit showed that the facts that gave rise to the claim against the defendant had been amply established. There was no flaw sufficient enough to override the plaintiff's right to be heard. Thus, the defendant's objection was dismissed.
(p 165 f)

[3] Section 56(1) of the Contracts Act 1950 covers situations where time is expressed to be an essence of the agreement and failure to deliver or perform the contract within the stipulated time, would give the promisee an option to annul the contract or treat it as subsisting and sue for compensation or damages. (p 166 f-g)

[4] As evidenced by cl. 7 of the sale and purchase agreement, both parties have expressly agreed that time was of the essence in relation to performance of the contract. Accordingly, the plaintiff was entitled to terminate the agreement as it did and be refunded all the moneys that had been paid towards the purchase price. The plaintiff was also entitled to damages under the agreement subject to formal proof.
(pp 166 h & 167 a)

[Preliminary objection dismissed. Appeal set aside.]

Case(s) referred to:
Chye Fook & Anor v. The Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308 ***(refd)***
Kang Yoon Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471 ***(refd)***
Tan Yan Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56(1), (2)
Rules of the High Court 1980, O. 14 rr. 1, 2(1)

For the plaintiff - Leslie Looi Meng; M/s LM Looi & Assocs
For the defendant - Wong Rhen Yen (David Paul); M/s Dennis Nik & Wong

Reported by M Maheswaran

JUDGMENT

Azhar Ma'ah J:

This is an appeal by the defendant against the decision of the senior assistant registrar given on 20 June 2001 in allowing the plaintiff to enter a final judgment against the defendant under O. 14 r. 1 of the Rules of the High Court 1980.

Briefly, the facts of the case are these. The plaintiff and the defendant on 16 March 1996 entered into a sale and purchase agreement whereby the plaintiff agreed to purchase a unit of condominium particularly known as 2-38-T Polo Park, Johor Bahru which at the material time was under development by the defendant. The purchase price was RM681,166.

Clause 7 of the said agreement provided that "time shall be the essence of the contract in relation to all provisions of the agreement". It was also a term of the agreement that the completion and the handing over of vacant possession was to take place within 36 months from the date of the agreement failing which the defendant "shall pay immediately to the plaintiff liquidated damages to be calculated from day to day at the rate of ten percent (10%) per annum of the purchase price.

The 36 months period would expire on 16 March 1999. Came 16 March 1999 the defendant was unable to deliver a vacant possession of the said unit to the plaintiff. By that time the plaintiff had already made various payments towards the purchase price amounting to RM544,932.80.

As a result the plaintiff by its solicitors wrote to the defendant demanding delivery of vacant possession of the said unit within 30 days, failing which the plaintiff would be entitled to terminate or annul the sale and purchase agreement.

Following the defendant's failure to meet the above demand the plaintiff by its solicitor's letter dated 13 November 2000 notified the defendant that the agreement was being terminated and thus demanded for the return of the money so far paid towards the purchase price together with damages which is alleged to be payable under the agreement. Failing to get positive response from the defendant the plaintiff instituted the present action.

Subsequently the plaintiff filed an application for a summary judgment under O. 14 of the Rules of the High Court 1980. This was allowed by the senior assistant registrar. Hence, this appeal.

By way of preliminary objection counsel for the defendant argued that the plaintiff's application for the summary judgment was not properly laid before the senior assistant registrar by reason of non-compliance of Form 18, the

format to be used for an O. 14 application. It was contended that the plaintiff's affidavit supporting the application did not specifically state that the defendant at the commencement of the proceedings was justly and truly indebted to the plaintiff in the sum of RM681,686.91. It was further contended that whatever facts that were deposed in the supporting affidavit were not the deponent's personal knowledge but derived from the advice of the plaintiff's solicitors. As such the deposition should not be admitted as evidence.

In resisting the above objection it was argued for the plaintiff that the facts that gave rise to the action by the plaintiff had been comprehensively set out in the supporting affidavit.

The mode in which an application under O. 14 is to be made is prescribed under r. 2(1) which states that such application must be supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim. A straight reading of r. 2(1) will clearly show that what is required in an affidavit supporting an O. 14 application is a verification by the deponents of facts on which the applicant's claim and application is based and by reason of that the deponent believes that the defendant had no defence. It is to be noted that nowhere in the rule requires that the source of the deponent's belief should be his personal knowledge. The deponent's belief can also derive from records or documents that are in his custody or also from advice of solicitors who have access to such records and documents.

A perusal of the plaintiff's affidavit that supported the application for summary judgment, showed that the facts that gave rise to the claim against the defendant had been amply and sufficiently set out. There was no flaw that was serious enough to override the plaintiff's right to be heard on his claim.

Legal technicalities should never be allowed to prevail over justice. The defendant's preliminary objection is thus, dismissed.

Merit Of The Appeal

Learned counsel for the defendant argued that the plaintiff was not entitled to rescind the contract as the agreement made no provision for such action. The only remedy that the plaintiff could resort to was to claim damages for delivery after taking possession of the unit as provided under cls. 22 and 24 of the sale and purchase agreement.

In ancipation of the plaintiff's counsel's argument that there were decided authorities (case law) that had allowed the promisee in breached contracts to terminate such agreements, counsel for the defendant argued that in all these cases the development projects were abandoned and not completed as opposed

to the present case where all the units were ready for delivery to the respective purchasers but for the delay. Cases referred to by the defendant's counsel were *Chye Fook & Anor v. The Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308, *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471 and *Tan Yan Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666. As the facts of these three cases can be distinguished from the present case it is contended that the decisions in the former cannot be related to the latter.

In reply to the above defendant's counsel's argument, counsel for the plaintiff contended that the plaintiffs action was for money paid as well as under s. 56 of the Contracts Act 1950. It was submitted further that although the facts of the above-mentioned cases could be distinguished from the present case the decisions in those cases did not disentitle the plaintiff from pursuing his rights under s. 56 of the Contracts Act 1950.

Section 56(1) of the Contracts Act 1950 reads as follows:

> when a party to a contract, promises to do a certain thing at or before a specified time, ... and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be the essence of the contract.

Then sub-s. 2 of s. 56 provides as follows:

> If it was not the intention of the parties that time should be the essence of the contract, the contract does not become voidable by the failure to do the thing before the specified time; but the promisee is entitled to compensation from the promisor, for any loss occasioned to him by the failure.

It can be seen clearly that the above provisions cover two different situations. Subsection 1 covers a situation where time is expressed to be an essence of an agreement and failure to deliver or perform the contract within the stipulated time, will give the promisee an option to annul the contract or treat it as subsisting and sue for compensation or damages whilst sub-s. 2 covers a situation where there is no express provision of the intention of the parties that time is an essential term of the agreement and in the event of a party's failure to meet the dateline for the performance of the agreement the promisee is not entitled to terminate the contract but can only sue for compensation for any loss occasioned by the failure.

Now, coming back to the present case by cl. 7 of the sale and purchase agreement both parties have expressly agreed that "time shall be the essence of the contract in relation to all provisions of this agreement". The decision of the courts in the abovementioned cases which incidentally dealt with cases

of abandoned projects do not in any way affect the right of the aggrieved promisee to exercise the option given to him by the statute. In the circumstances, on the given facts of the present case the plaintiff is held to be entitled to terminate the agreement as it did and be returned all the monies that had been paid towards the purchase price. The plaintiff is also entitled to damages as provided under the agreement subject to formal proofs.